ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T CONTRACT TARIFF NO. 374	)	Transmittal Nos. CT 2952 and CT 3441
	)	CC Docket No. 95-133

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION ON DIRECT CASE

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Summary

AT&T has attempted to use this proceeding to severely diminish the substantial cause test by asserting that the test is inapplicable to proposed revisions to long-term service arrangements unless affected customers can demonstrate that they will be harmed by the changes. Although the existing customer of Contract Tariff No. 374, The Furst Group, Inc. ("TFG"), has not consented to material revisions to its long-term arrangements in Contract Tariff No. 374, AT&T claims it should not be required to demonstrate substantial cause for the material modifications to that Tariff because they allegedly result in certain rate reductions for TFG. Even assuming the veracity of AT&T's factual claims and ignoring the obvious question (why TFG would contest the proposed modifications if it were in fact benefitted by them), there is no legal authority for AT&T's novel position.

The substantial cause test, used by the Commission to evaluate the justness and reasonableness of proposed unilateral revisions to long-term service arrangements under Section 201(b) of the Communications, was propounded and has continually been applied in recognition of the legitimate expectations of customers of long-term service arrangements in the stability and predictability of the terms of those arrangements. It has never required a showing that the customer of a long-term service arrangement will not be benefitted by a proposed revision, only that the revision would materially alter – without the customer's consent – the terms of the arrangement to which the customer agreed and on which the customer has relied. Accordingly, application of the substantial cause test is not only appropriate, but required, in this case.

Even if AT&T were able to demonstrate substantial cause for its proposed modifications of Contract Tariff No. 374 -- an issue which TRA does not address – and the modifications are allowed, TFG should be permitted to terminate its arrangement with AT&T without liability or should be exempted (or "grandfathered") from the modifications, since it has not agreed to them. Ample Commission precedent and principles of fundamental fairness support both results.

Finally, under the Sierra-Mobile doctrine, AT&T should not be permitted to alter unilaterally the terms of its longstanding relationship with TFG through a tariff filing to which TFG has not consented. Although this relationship is embodied in a filed Contract Tariff, that fact only supports, rather than negates, application of the doctrine notwithstanding a recent Common Carrier Bureau decision to the contrary.

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The Telecommunications Resellers Association ("TRA" or "Association"), by its attorneys, hereby submits its Comments on the Direct Case of AT&T Corp. ("AT&T"), filed in response to the Order Designating Issues for Investigation, DA 95-1784 (released August 11, 1995) ("Designation Order").

For the reasons set forth below, the Bureau should find that:

(1) AT&T must demonstrate substantial cause for the proposed tariff revisions at issue because they materially alter the terms of a customer's long-term service arrangement without the customer's consent;

(2) the issue whether the revisions purportedly benefit the affected customer is irrelevant to the question whether the substantial cause should be applied to proposed tariff revisions;

(3) even if AT&T can demonstrate substantial cause for the proposed revisions, the affected existing customer should be permitted to terminate its long-term arrangement without liability or should be exempted from the revised terms,

since the revisions would materially affect the terms of the arrangement on which the customer has relied, and the customer has not consented to the revised terms; and

(4) the Sierra-Mobile doctrine prohibits unilateral alteration by carriers of material terms of long-term arrangements such as that attempted here by AT&T, and the fact that the arrangement's terms are contained in a filed Contract Tariff does not nullify the doctrine.

I.

INTRODUCTION

AT&T has seized this opportunity to attempt to whittle away at the "substantial cause" test, which restricts a carrier's ability to alter unilaterally the terms of long-term service arrangements without the existing customer's consent.[1/] In applying the substantial cause test, the Commission attempts to determine whether a proposed tariff revision is just and reasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). If the proposed revision materially alters the terms of the underlying tariff, the carrier must demonstrate substantial cause for the change or the proposed revision will be found to be unjust and unreasonable.

The position of the existing customer(s) -- in this case, The Furst Group, Inc. ("TFG") -- is critical to the substantial cause analysis, and if a proposed revision materially alters the long-term arrangement on which the customer relied, and the customer has failed to consent to the revision, the revision will be found to be unjust and unreasonable unless the carrier can demonstrate substantial cause for the revision. Contrary to the position

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1/ RCA American Communications, Inc., 84 F.C.C.2d 353, 357 (1980) ("RCA Americom Investigation Order"); Showtime Networks, Inc. v. FCC, 932 F.2d 1, 6 (D.C. Cir. 1991).

taken by AT&T, the substantial cause test does not require a showing by the affected customer that it is disadvantaged by the proposed revision, only that the proposed revision materially alters the long-term arrangements to which the customer has committed and on which the customer relies.

Even if a carrier is able to demonstrate substantial cause for a revision to a long-term service arrangement, a customer may terminate the arrangement without liability or be exempted from the revised terms if its rights and obligations under the revised tariff would materially differ from those to which it originally committed and if the customer failed to agree to the proposed revisions.[2/] Thus, even if the Bureau finds that AT&T has demonstrated substantial cause for the proposed tariff revisions at issue in this proceeding, it should permit TFG to terminate its long-term arrangement with AT&T without liability or exempt TFG from the revised terms.

Finally, AT&T is prohibited by the Sierra-Mobile doctrine from unilaterally altering by tariff material terms of long-term service arrangements with carrier-customers, such as TFG, without their consent. The Bureau's recent determination that the Sierra-Mobile doctrine does not apply to arrangements such as TFG's, where the carrier-carrier contract is embodied in a Contract Tariff filed with the Commission and made generally available to similary situated customers,[3/] is unsupported by precedent and contrary to the policies and spirit of the Sierra-Mobile doctrine.

[2/] Competition in the Interstate Interexchange Marketplace, CC Docket 90-132, 10 F.C.C. Rcd. 4562 (1995); AT&T Communications -- Revisions to Tariff F.C.C. No. 1, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); AT&T Communications -- Revisions to Tariff F.C.C. No. 2, Transmittal No. 2, 6 F.C.C. Rcd. 5304 (Com. Car. Bur. 1991).

[3/] AT&T Communications Contract Tariff No. 360 - Transmittal No. CT 3076, CC Dkt. No. 95-80 (released June 5, 1995) ("CT No. 360").

II.

ARGUMENT

A. AT&T must demonstrate substantial cause for the proposed tariff revisions at issue because they materially alter the terms of a customer's long-term service arrangement without the customer's consent.

1. The Substantial Cause Test

The "substantial cause" test (also known as the "substantial cause for change" test) was developed by the Commission as a means of evaluating the reasonableness, under Section 201(b), of unilateral carrier tariff revisions to long-term service arrangements. RCA American Communications, Inc., 84 F.C.C.2d 353, 357 (1980) ("RCA Americom Investigation Order"); Showtime Networks, Inc. v. FCC, 932 F.2d 1, 6 (D.C. Cir. 1991). The test is invoked when a carrier initiates a tariff revision that would materially alter a long-term arrangement without the consent of the affected customer. AT&T Communications -- Contract Tariff No. 374, DA 95-1061 (Com. Car. Bur. released May 10, 1995) at ¶¶ 3, 10. The test is applied even where a carrier's tariff broadly reserves the right to the carrier to change the terms and conditions of the tariff during the term. RCA American Communications, Inc., 86 F.C.C. 2d 1197 (1981) ("RCA Americom Suspension Order") at 1202.

The test seeks to "ascertain reasonableness where a carrier provides service under a comprehensive, contract-like tariff scheme, and later seeks to modify material provisions during the term specified in the tariff." Id. at 1201. The Commission has recognized that, in applying the test, its "statutory responsibilities dictate that we take into account the position of the relying customer in evaluating the reasonableness of the change." Id. Thus, the determination of reasonableness "involves considerations of fairness to carrier and

customer alike." RCA Americom Investigation Order, 84 F.C.C.2d at 356. More specifically, the test asks whether the business needs and objectives of the carrier (and/or the injury to the carrier which the tariff revision is designed to prevent) outweigh the customer's loss of its legitimate expectation of commercial certainty and stability. See AT&T Communications -- Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777 at 6779, ¶¶ 16, 21 (Com. Car. Bur. 1990).

2. **The substantial cause should be applied wherever a carrier materially alters a long-term service arrangement without the customer's consent, regardless of the specific effect of the alteration on the customer.**

a. **The substantial cause test is intended to protect the stability and predictability of long-term arrangements on which customers have relied.**

At the heart of the substantial cause test are notions of customer reliance, commercial stability, contract law, and fundamental fairness. The primary inquiry in applying the substantial cause test is not, as AT&T asserts, whether a proposed tariff revision disadvantages or benefits the affected customer, but is instead whether the revision would materially alter the stability of the contractual relationship and the expectations of the customer. As the Commission explained in the RCA Americom Investigation Order, 84 F.C.C.2d at 357:

> The long term service arrangements found in RCA Americom's current tariff bear similarities to service contracts often entered into by unregulated firms. The carrier offers definite terms for a fixed period, most likely after negotiations with potential customers; the customers then decide whether to accept the offer based upon whether the offering meets their needs at a price they are willing to pay. The rates and the length of service term would of course be among the most important terms for customers. In this case, the question is raised as to whether customers have chosen RCA Americom's service

> because of those terms, and relied upon its terms in contracting with their own customer, as well as in making investments and other business decisions.

(Emphasis added.)

Similarly, in Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873 (1989), the Commission wrote that

> we developed the substantial cause test as a tool for evaluating tariff changes in a circumstance in which customers had a legitimate expectation that the change would not occur. In RCA American Communications, the carrier created such an expectation in a few identifiable customers when it offered service for a fixed term. The contract-like offering of a long term tariff is not, however, the only way in which legitimate expectations of rate stability can be created. In our price caps plan, it is this Commission that creates for ratepayers the legitimate expectation that, in general, rates will decrease in real terms from the levels they could expect under rate of return.

Id. at ¶ 474 (emphasis added).

And in RCA American Communications, Inc. -- Revisions to Tariff F.C.C. Nos. 1 and 2, 2 F.C.C. Rcd. 2363 (1987), the Commission stated that "customers are entitled to rely on stability in material provisions of tariffs that offer service for extended terms. . . ." Id. at ¶ 26.

While considerations of customer fairness and reliance have long been the touchstone of the substantial cause test, recently the Commission has recognized that contract law principles, which themselves are based on considerations of fairness for both contracting parties, are instructive in applying the test.[4/] Thus, when it recently explained

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[4/] Examples of contract law principles which would seem to be applicable to unilateral carrier attempts to change material terms of long-term service arrangements include the doctrines of impossibility of performance, frustration of purpose, and commercial impracticability, all of which require the party asserting them as a defense to non-performance of its contractual obligations to show that extreme unforeseeable circumstances arose which prevented the party from performing under the original terms of the agreement. See 18 S. Williston & W. Jaeger, Williston on Contracts (3d ed. 1978) at 1, et seq.; Restatement (Second) of Contracts (1979) §§ 261, et seq.

how it would apply the substantial cause test to evaluate unilateral revisions by AT&T of Contract Tariff terms, the Commission wrote:

> Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assessment of whether a contract-based tariff revision is just and reasonable under the substantial cause test. We are not prepared, however, to say at this time that these principles provide definitive parameters for a substantial cause showing. Instead, we will consider on a case-by-case basis in light of all relevant circumstances whether a substantial cause showing has been made.

Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, FCC 95-2 (released February 17, 1995) ("Interexchange MO&O on Reconsideration") at ¶ 25 (footnote omitted).

The substantial cause test is premised on the Commission's recognition that a number of economic benefits can be obtained when carriers and customers define their relationships by long-term, contract-like service arrangements[5/] and that stability and predictability are more important to such relationships than to carrier/customer relationships based only on tariffs:

> [A] carrier's proposal to modify extensively a long term service tariff may present significant issues of reasonableness under Section 201(b) of the Act which are not ordinarily raised in other tariff filings. In our judgment, the right of a carrier to change its tariff unilaterally should be viewed in a different light when the tariff itself represents, in large measure, a quasi-contractual agreement between the carrier and the customer. We have recognized in the Competitive Carrier Rulemaking the benefits which contracts bring to the carrier-customer relationship. The private negotiation process will generally, in the absence of market power, conclude in a more efficient bargain than that which our regulatory process would artificially impose. Contracts also lend certainty to the process. In contrast, any commitment reflected in a tariff would be fully binding on the customer as a

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5/ This reasoning is consistent with economic theory, which holds that the economic benefits of contracts depends on their predictability, which in turn requires that they be equally binding on both parties, except under extreme circumstances. See, e.g., R. Posner, Economic Analysis of Law 79, et seq.

> matter of law (Section 203, 47 U.S.C. §203) yet the carrier would remain free to change the terms of the service offering at any time. It strikes us as anomalous that a carrier could use the tariff filing process to prevent any of its service terms from being enforced against it by customers, while at the same time bind customers to all the tariff provisions for as long as the carrier wishes until expiration of the terms by operation of the tariff itself. In effect, then, the result would be an agreement that only one of the contracting parties could enforce.

RCA Americom Investigation Order at 358-59 (emphasis added).

The Commission recently re-emphasized the benefits of carrier-customer contracting and the role that the substantial cause test plays in preserving the predictability of such contractual relationships:

> In applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and [interexchange carriers] through greater availability of long-term commitments and price protection. This benefit would be reduced if AT&T was unilaterally able to alter material terms of their contracts.

Interstate Interexchange Order on Reconsideration, 7 F.C.C. Rcd. 2677 (1992) at ¶ 25 (footnote omitted) (emphasis added).

Like the Commission, the Court of Appeals has acknowledged that the substantial cause test is intended to protect the interests of customers that have relied on the stability of long-term arrangements. When RCA Americom challenged the Commission's use of the test in the U.S. Court of Appeals for the District of Columbia Circuit, the Court upheld the Commission, writing:

> We see no reason why the Commission, in a thoughtful and properly supported exercise of its expertise, could not decide that substantial customer reliance expenditures have been induced by a particular type of tariff, and

> that these should play a significant role in defining the zone of reasonableness within which the carrier is free subsequently to modify its rates and practices.

RCA American Communications, Inc. v. FCC, Nos. 81-1558, 81-1597, slip op. at 4 (D.C. Cir. July 21, 1982).

Similarly, the Commission has reasoned that

> we have broad authority to interpret the Communications Act and determine when a tariff is just and reasonable. See Nader v. FCC, 520 F.2d 182, 192 (D.C. Cir. 1975). We used that authority in this instance by employing the substantial cause for change test as a tool for defining the appropriate zone of reasonableness applicable to the Americom tariffs. The circumstances that surrounded the Americom filing clearly indicated that customer fairness was an appropriate factor to be considered under the Section 201 reasonableness test. In particular, . . . the nature of the tariffs and proposed changes before us indicated that customer equity was an important consideration in this case.

RCA American Communications, Inc., Memorandum Opinion and Order, 94 F.C.C.2d 1338 (1983) at ¶ 7.

Customers of AT&T's long-term service arrangements -- particularly resellers, such as TFG -- rely on the stability and predictability of the terms of their long-term arrangements in entering into agreements, many of them long-term, with *their* customers and with other parties with which they do business. Because they have relied on the terms of their arrangements with AT&T in negotiating terms with other parties with which they do business, their businesses can be severely disrupted (or worse) if AT&T is permitted to change the terms of their long-term arrangements without their consent. Regardless of the nature of the change, a material change itself requires reseller customers to adjust their projected expenses, revenues, profits, and often, customer contracts, and it results in their inccurring unexpected administrative costs, and potentially losing customers. Reseller customers therefore rely on the substantial cause test as a litmus test to evaluate the

necessity of tariff revisions and to enforce the stability and predictability of their negotiated terms of service.

The Commission itself has repeatedly observed that customers enter into long-term service arrangements largely for the stability and predictability that such arrangements afford. Such stability and predictability in turn bring benefits to the marketplace that tariffed service alone would not yield, such as efficient allocation of resources, and an ability to plan resource and revenue needs and sources. See RCA Americom Investigation Order at 358-59; Interexchange Order on Reconsideration at ¶ 25. It is the disruption of commercial stability, not the nature of the disruption, that triggers the substantial cause test. If, as here, a proposed tariff revision would materially disrupt a long-term relationship between AT&T and a customer, regardless of the nature of that disruption, the Commission should apply the substantial cause to evaluate whether the carrier can justify the revision notwithstanding the impact it would have on the customer.

Because AT&T has attempted to alter material terms of TFG's long-term service arrangement through a unilateral tariff filing, it should be required to demonstrate substantial cause for the proposed changes, irrespective of its claims as to the benefits or advantages that will flow to the customer from the proposed changes. See Interexchange Order on Reconsideration at ¶¶ 23, 25. Indeed, if TFG were, as AT&T asserts, truly benefitted by the proposed changes, it would seem highly illogical for it to challenge the changes, as it has done here.

b. AT&T has provided no authority that supports its position.

AT&T has taken a position in its Direct Case that is, to put it charitably, a leap of faith. It uniquely interprets the substantial cause test as requiring a showing that the

customer affected by a proposed tariff revision will be disadvantaged, rather than benefitted, by the revision.

AT&T claims, Direct Case at note 8, that the substantial cause test "has never been applied in a case involving a rate reduction." If this is true (a point which TRA does not concede), it can probably be explained by the fact that, under most circumstances, a customer would have no incentive to challenge rate decreases. Where, however, as here, the customer is a reseller with its own customer relationships, any change in long-term rates, volume thresholds, discount tapers, or other material terms of service -- even if they could benefit the customer in some ways -- would still result in disruption of the reseller customer's relationships with its own customers and in the business expectations of the reseller customer. Moreover, even if the substantial cause test has never been applied in the case of a proposed rate reduction, as AT&T asserts, there is no legal impediment to such application of the test, as discussed below.

AT&T is unable to cite a single decision or regulatory provision in support of its position. In fact, there is no precedent for the reading advanced by AT&T.

None of the cases AT&T has cited to supposedly support its interpretation of the substantial cause test is directly on point, factually or legally, with the circumstances presented here. No case addresses proposed unilateral revisions to a Contract Tariff whose terms were individually negotiated and relied on by a particular reseller customer, as with TFG's Contract Tariff No. 374. Instead, all of AT&T's "supporting" precedent arose in the context of attempted revisions by AT&T to long-term offerings contained in generally

available tariffs, rather than individually tailored contractual arrangements.[6] Moreover, none of AT&T's cited precedent holds that a customer seeking to invoke the substantial cause test must demonstrate any harm or disadvantage whatsoever, or even suggests that such a requirement exists.[7] In a number of AT&T's cited cases, AT&T voluntarily exempted (or "grandfathered") existing long-term customers from the proposed tariff revisions, thereby precluding them from complaining about the revisions.[8]

AT&T's position is also directly undercut by the decision of the Commission in

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[6] *E.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 1, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); AT&T Communications, Revisions to AT&T Tariff F.C.C. No. 2, 6 F.C.C. Rcd. 5304 (Com. Car. Bur. 1991); AT&T Communications, Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777 (Com. Car. Bur. 1990) (even though long-term arrangements were not contained in individually negotiated contract tariffs, but in generally available tariffs, proposed revisions to those arrangements were rejected because AT&T failed to show substantial cause); AT&T Communications, Revisions to Tariff F.C.C. No. 1, Transmittal No. 2422 (Com. Car. Bur. 1990); AT&T Communications, Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 130 (Com. Car. Bur. 1989), aff'd, 9 F.C.C. Rcd. 292 (1994); Eternal Word Television Network v. AT&T Co., 2 F.C.C. Rcd. 1369 (1987) (rates at issue were contained in various AT&T tariffs; Commission found that such tariffs created no long-term contractual relationship involving fixed rates for a fixed term).

[7] Indeed, in a number of the cited decisions, there was not even any discussion of the showing that must be made by either party to raise, demonstrate, or disprove the existence of substantial cause, but only a cursory conclusion that the proposed revisions were not patently unlawful. *E.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 1, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); AT&T Communications, Revisions to AT&T Tariff F.C.C. No. 2, 6 F.C.C. Rcd. 5304 (Com. Car. Bur. 1991); AT&T Communications, Revisions to Tariff F.C.C. No. 1, 5 F.C.C. Rcd. 5988 (Com. Car. Bur. 1990); AT&T Communications, Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 130 (Com. Car. Bur. 1989), aff'd, 9 F.C.C. Rcd. 292 (1994) (although Bureau had failed to state grounds for its decision and specifically did not require AT&T to show substantial cause, "the denial of a petition to reject a tariff merely concludes that a challenged provision is not patently unlawful; that is, that the challenged filing does not on its face violate the Communications Act or our rules").

[8] *E.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 1, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); AT&T Communications, Revisions to Tariff F.C.C. No. 1, 5 F.C.C. Rcd. 5988 (Com. Car. Bur. 1990).

RCA American Communications, Inc. - Revisions to Tariff F.C.C. Nos. 1 and 2, 2 F.C.C. Rcd. 2363 (1987), in which the Commission rejected an argument similar to AT&T's, stating:

> RCA Americom appears to believe that its customers must prove detrimental reliance in order for the carrier to be, in effect, estopped from altering its tariff terms in midstream. We have never so held. Rather, the basis of the substantial cause test is the apparent unfairness of allowing a carrier to alter material provisions of a long-term tariff when customers have agreed to take service under the understanding that, by offering such terms, the carrier has sacrificed some of its traditional flexibility to revise its tariff at any time.

Id. at note 27 (emphasis added).

Similarly, in Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C. Rcd. 2873 (1989), the Commission wrote that

> there is nothing inherent in a substantial cause requirement that demands that we be able to individually analyze the reliance interests of identifiable customers. Indeed, since we are intentionally creating [in price caps], for ratepayers as a general class, the general expectation of rates that do not exceed the upper bands, we may presume that they rely on that general expectation. We do not expect the nature and extent of customer reliance typically to be at issue in investigations of above-band rates.

Id. at ¶ 475.

Clearly, AT&T's assertion that the substantial cause test is inapplicable absent a showing that the disputed tariff revisions will disadvantage the customer is untenable, unsupportable, and just plain wrong. TFG need not make any such showing to invoke the substantial cause test to evaluate the reasonableness of AT&T's proposed revisions to Contract Tariff No. 374.

B. Even if AT&T can demonstrate substantial cause for the proposed revisions, TFG should be permitted to terminate its long-term arrangement without liability or should be "grandfathered" as exempt from the revisions since they would materially affect the terms of the arrangement and TFG has not consented to them.

Whether or not AT&T is able to demonstrate substantial cause for its attempted unilateral alteration of its long-term service arrangement with TFG -- an issue which TRA will not address -- the proposed Contract Tariff revisions would result in a significant readjustment of the relative rights, obligations, and expectations of AT&T and TFG. Since TFG has not consented to such a realignment of its expectancy interests, it would be fundamentally unfair to require it to remain bound to long-range terms and conditions to which it did not agree. Furthermore, if the revisions are permitted, AT&T would be encouraged to make future material alterations to its arrangement with TFG that could be very detrimental, if not fatal, to TFG and its relationships with its customers.

For these reasons, if the Bureau permits AT&T to alter unilaterally its long-term service arrangement with TFG, it should either "grandfather" TFG, *i.e.*, exempt it from the revisions, or permit TFG to terminate its relationship with AT&T without liability. Either alternative would be consistent with Commission precedent.

The Commission has recently indicated in CC Docket 90-132 that, under some circumstances, it would permit customers of AT&T long-term service arrangements to terminate those arrangements if AT&T attempted to alter material terms of those arrangements without their consent, ***even if AT&T were able to demonstrate substantial cause for the alteration.*** Competition in the Interstate Interexchange Marketplace, CC

Docket 90-132, 10 F.C.C. Rcd. 4562 (1995) ("Interstate Interexchange MO&O on Reconsideration") at 4574, ¶ 25. The Commission explained:

> In applying the substantial cause test to AT&T's contract-based tariff modifications, we will consider that the original tariff terms were the product of negotiation and mutual agreement. We believe that the fact that AT&T and the customer chose to do business via a contract-based tariff and not a generic tariff should carry certain consequences. As we observed in the Notice of Proposed Rulemaking in this proceeding, one benefit of contract carriage is that it can facilitate planning by both users and IXCs through greater availability of long-term commitments and price protection. This benefit would be reduced if AT&T was unilaterally able to alter the material terms of their contracts. Given the special nature of contract-based tariffs, we believe that commercial contract law principles are highly relevant to an assess of whether a contract-based tariff revision is just and reasonable under the substantial cause test. . . . In the unlikely event that a material change to a contract-based tariff meets the substantial cause test, we will . . . consider on a case-by-case basis whether to permit customers taking service under that contract-based tariff to terminate their contract.

Id. at 4574, ¶ 25 (emphasis added; footnotes omitted).

Thus, even if the Bureau fails to find here, as it should, that AT&T's proposed tariff revisions are unjust and unreasonable because they materially alter TFG's long-term service arrangement without its consent, it should permit TFG to terminate its arrangement without liability.

Moreover, there is ample precedent for the Bureau simply to grandfather TFG and exempt it from the proposed tariff revisions. *E.g.*, AT&T Communications -- Revisions to Tariff F.C.C. No. 1, Transmittal No. 8640 (Com. Car. Bur. July 11, 1995); AT&T Communications – Revisions to Tariff F.C.C. No. 2, Transmittal No. 2, 6 F.C.C. Rcd. 5304 (Com. Car. Bur. 1991) (both cited in Direct Case of AT&T at 5-6, n. 8).

Either approach -- grandfathering or permissive termination without liability – would be consistent with principles of economic theory, contract law, and fundamental

fairness. The stability of long-term contractual terms and conditions is an important element of the bargain which long-term customers expect when they commit to extended service plans provided by AT&T. If that element is removed without their consent, optional termination of their arrangements without liability (or grandfathering) is an appropriate remedy for customers that believe that the benefits of the bargain no longer outweigh the risks. Of course, some customers may decide to continue with the arrangements, notwithstanding the lack of stability of the terms of those arrangements.

As noted previously, as a matter of economic theory, the economic benefits of contracts derive from the stability and predictability that they bring to the market, but such benefits require that the contracts are equally binding on both parties. If AT&T is free to materially alter the terms of its long-term arrangements, then its existing customers should be free to terminate those arrangements without liability or be exempted from the revised terms.

Finally, either of the proposed resolutions, though less than desirable, would be a balanced, equitable approach which would represent a thoughtful balancing of the supposed (though not demonstrated) business needs of the carrier against customer considerations of fairness, stability, and predictability, all of which are permissible considerations in the determination whether a carrier's acts or practices are reasonable under the substantial cause test and Section 201 of the Act.

C. The Sierra-Mobile doctrine prohibits unilateral alteration by carriers of material terms of long-term arrangements such as that attempted by AT&T, and the fact that the arrangement's terms are contained in a filed Contract Tariff does not nullify this result.

Since at least the middle of this century, it has been settled law that a carrier -- whether it be a communications carrier, a gas pipeline provider, or an electrical utility --

may not use a tariff to revise unilaterally the terms of a legitimate contractual service arrangement. United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956) (construing Natural Gas Act); Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (construing Federal Power Act); MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535 n.27 (D.C. Cir. 1983); Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1282 (3d Cir. 1974) ("Bell Telephone"), cert. denied, 422 U.S. 1026, reh. den., 423 U.S. 886 (1975) (construing Communications Act).

In Bell System Tariff Offerings (Docket 19896), 46 F.C.C.2d 413, 432 (1974), aff'd, Bell Telephone, supra, the Commission itself endorsed this fundamental principal, stating:

> Bell cannot supersede, modify or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action. In light of the court decisions interpreting comparable legislation, it appears that, except as expressly modified by statute, Bell's contractual obligations with Western Union are governed by common law and can be changed or modified only in accordance with the procedures set forth in the contracts or the Communications Act. . . . [I]t is clear that neither common law nor the Act authorizes Bell unilaterally to alter its contracts with Western Union.

Id.

In other words, the Sierra-Mobile doctrine "restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts," MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981) ("MCI").

The decisions in Midwestern Relay Co., 69 F.C.C.2d 409 (1978), and American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980) ("ABC"), both cited by AT&T, do not require a contrary result in this case, and indeed, bolster the proposition that individually negotiated long-term arrangements whose terms are filed as contract tariffs

should be subject to the Sierra-Mobile doctrine, notwithstanding a recent Bureau decision to the contrary.[2/]

Most fundamentally, unlike here, the contractual arrangements at issue in Midwestern Relay and ABC were between a carrier and non-carrier customers, and were not filed with the Commission and made generally available to similarly situated customers. ABC and CBS had entered into separate contracts with Midwestern Relay Company ("Midwestern") for microwave video transmission service. ABC, supra, 643 F.2d at 819. The contracts both provided that Midwestern would not "of its own volition" file any tariff inconsistent with the terms of the agreements during the terms thereof, but both contracts specifically contemplated that Midwestern would file a tariff for the service provided under contract, and that the tariff, once filed, would be incorporated in both agreements. Id.

Midwestern filed its tariff -- after contracting with CBS, but before contracting with ABC. Id. Later, while the contracts were still in effect, Midwestern amended its tariff to increase the rates set forth therein, and CBS and ABC appealed to the Commission to deny the tariff revisions. Id. at 820.

On reconsideration of its initial decision on the matter, the Commission refused to consider the argument that the tariff revisions unlawfully conflicted with the terms of the contracts with ABC and CBS. Midwestern Relay, 69 F.C.C.2d 409, 413 (1978). The Commission wrote, in words no longer applicable:

> Even if we were to agree with Petitioners that carrier-customer contracts should be allowed to definitively establish rates in some limited areas, we are prevented from so finding as the Communications Act . . . does not provide for rates to be set in this manner.

[2/] AT&T Communications - Contract Tariff No. 360, Transmittal No. CT 3076, CC Dkt. No. 95-80 (Com. Car. Bur. June 5, 1995) ("CT No. 360") at ¶ 11.

Id., 69 F.C.C.2d at 418 (quoted in ABC, 643 F.2d at 820).

On review, the D.C. Circuit upheld the Commission. The basis for the Court's reasoning was the fact that, although Section 211(a) of the Communications Act requires carriers to file inter-carrier agreements, no provision of the Act requires carrier-customer agreements to be filed. ABC, 643 F.2d at 823. The Court specifically declined to interpret the breadth of Section 211(b) of the Act, which permits the Commission to require carriers to file their agreements with customers. Id., 643 F.2d at 823 n.5. Instead, the Court reasoned that,

> while Section 211(b) arguably may authorize the Commission to provide for the filing of contracts such as those here at issue, the Commission has not yet exercised such authority, if any, as it may have in this respect. . . . The difficulty here is precisely that, because no such provision [as Section 211(a)] applied to this contract, the clause in dispute was made available neither to the public nor the Commission. Hence, the disputed clause is just the kind of unpublished contractual alteration of a tariff which the Act condemns.

Id., 643 F.2d at 823, 826 (emphasis added).

The seminal case on which the D.C. Circuit relied in ABC was Armour Packing Co. v. United States, 209 U.S. 56 (1908) ("Armour"), which held that a freight carrier could not alter the terms of a filed tariff with an unfiled contract.

The Third Circuit in the earlier Bell Telephone case, supra, refused to apply Armour and instead applied Sierra-Mobile to the carrier-carrier contracts before it; but the ABC Court distinguished the Third Circuit's reasoning by noting that, unlike ABC, Bell Telephone concerned carrier-carrier contracts, for which filing was required by Section 211(a) of the Act. ABC, 643 F.2d at 825. The D.C. Circuit in ABC quoted from the Bell Telephone opinion:

> "We conclude that section 211(a) requires the filing of contracts such as the AT&T-Western Union contracts at issue. It follows from this conclusion that the Act permits AT&T and Western Union to provide for the leasing of facilities by contract, as well as by tariff. See United Gas v. Mobile Gas Corp., 350 U.S. at 338 . . . ("by requiring contracts to be filed with the Commission, the [Natural Gas] Act expressly recognized that rates to particular customers may be set by individual contracts."). Armour is therefore distinguishable."

Bell Telephone, 503 F.2d at 1278, cited in ABC, 643 F.2d at 825.

The fundamental premise underlying ABC, Midwestern Relay, and Bell Telephone -- that carriers may establish the terms of service to customers only by filed tariffs, and not by unfiled contracts -- is inapplicable to the instant facts since the contractually-set rates and terms at issue have been filed with the Commission in a Contract Tariff.

Although Section 211(b) of the Communications Act vests the Commission with the authority to require the filing by carriers of tariffs based on carrier/non-carrier contracts, at the time Bell Telephone and ABC were decided, the Commission had not developed a procedure for carriers to file such tariffs. In contrast, Section 211(a) of the Act required carriers to file their contracts with other carriers. Accordingly, while Bell Telephone dealt with filed contracts, and applied the Sierra-Mobile doctrine, ABC dealt with contracts that were not filed with the Commission, and the ABC Court therefore applied Armour. Things have changed.

Since carriers and non-carrier customers are now permitted to negotiate individual terms and conditions and enter into contracts, provided that the terms and conditions are filed with the Commission and made generally available to similarly situated customers, there is no legal or logical basis for distinguishing such contractually determined relationships from contractually determined carrier-carrier relationships, which have always

been subject to filing with the Commission, and to which the Sierra-Mobile doctrine has traditionally been applied.

Indeed, the fact that carrier-customer contractual arrangements are now required to be filed with the Commission and made generally available eliminates the sole reason that the Sierra-Mobile doctrine was not applied to such arrangements under earlier precedent; it should not provide a basis for rejecting the doctrine, as the Bureau did (without citation to authority) in Contract Tariff No. 360.

In that proceeding, more than one customer took service under the Contract Tariff, and it could have been (though apparently was not) argued that customers commencing service sometime after the initial terms were negotiated could not rely on initially negotiated terms.[10/] Here, however, TFG negotiated and relied on the terms AT&T now seeks to revise without TFG's consent. TFG's reliance interests merit protection.

Moreover, TFG is a reseller, and thus its Contract Tariff is a carrier-carrier contract to which application of the Sierra-Mobile doctrine is clearly warranted, under Bell Telephone and other precedent.

Precedent under the Interstate Commerce Act, on which the Communications Act was modeled, supports the interpretation that the filing of individually negotiated rates should trigger application of Sierra-Mobile, not provide grounds for rejecting it. In Sea-Land Service, Inc. v. ICC, 738 F.2d 1311 (D.C. Cir. 1984) ("Sea-Land"), the Court of Appeals explained that once a procedure was established for filing with the Interstate Commerce Commission contractually established rates and terms of freight carrier services,

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[10/] It was unclear from the Bureau's decision whether the original contract was negotiated by one or more customers.